LEW YOKE LENG & ORS

v.

SYKT KAR KING SDN BHD

HIGH COURT MALAYA, IPOH
JAMES FOONG J
[CIVIL APPEAL NO: 11-72-1999]
7 AUGUST 2000

CONTRACT: *Building contract - Delivery of vacant possession - Water and electricity, whether must be connected to house - Whether connection of electricity to substation sufficient - Electricity not connected to house within contractual period - Whether developer liable to pay liquidated damages - Certificate of fitness of occupation not obtained within contractual period - Whether a valid excuse for not connecting electricity to house*

The plaintiffs entered into an agreement with the defendant (developer/vendor) for the purchase of a house from the latter on 2 March 1993. Clause 20 of the agreement provided that the defendant shall pay the plaintiffs liquidated damages if vacant possession together with "the connection of water and electricity supply to the said building" was not delivered within 24 months from the date of the agreement. Although vacant possession was delivered to the plaintiffs on 15 December 1994, a certificate of fitness for occupation ('CF') was not issued until 5 January 1996, and electricity could only be supplied to the house on 16 January 1996. This was the plaintiffs' appeal from the decision of the magistrate dismissing their claim against the defendant for liquidated damages amounting to RM5,832.90 for the late delivery of vacant possession. The defendant's primary contention was that the words "the connection of … electricity supply to the said building" in cl. 20 of the agreement only meant the connection of electricity to the substation in the housing estate, and that it should not be held liable for not connecting electricity to the house because a CF could not be obtained in time.

Held:

[1] The words "vacant possession … with the connection of … electricity supply to the said building" in cl. 20 of the agreement clearly meant the connection of electricity to the house and **not** merely to the substation in the housing estate. The defendant had failed to fulfil this contractual obligation within 24 months from the date of the agreement, and its argument that it had no control over the issue of a CF was misconceived.

Obiter:

[1] The defendant should have completed the house well before the contractual period stipulated so as to allow time for inspection and the issue of a CF. It could also have constructed the house in strict compliance with all the plans and requirements so as to minimise any rectification works necessary for the issue of a CF.

[Appeal allowed.]

Case(s) referred to:
A-G v. County of London Electric Supply Co Ltd [1926] Ch 542 ***(dist)***
Hoya Holdings Sdn Bhd v. Chia Thin Hing & Anor [1994] 4 CLJ 992 ***(foll)***

Reported by Gan Peng Chiang

JUDGMENT

James Foong J:

Introduction

This is an appeal by the plaintiffs who are dissatisfied with the decision of the learned magistrate who dismissed their claim for a liquidated sum of RM5,832.90 being late delivery of a house they purchased from the defendant, with interest and cost.

Plaintiffs' Claim

By a sale and purchase agreement dated 2 March 1993 (S & P Agreement) the plaintiffs purchased from the defendant, a developer, a double-storey terrace house (the house) to be erected by the defendant.

Clause 20(2) of the S & P Agreement states as follows:

> If the Vendor fails to hand over vacant possession of the said Building, together with the connection of water and electricity supply to the said Building, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

"In time" as stipulated under cl. 20(1) of the S & P Agreement means:

> The said Building shall be completed by the Vendor and vacant possession, with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty-four (24) calender months from date of this Agreement.

Since the S & P Agreement was signed on 2 March 1993 twenty-four months matured on the 1 March 1995.

Vacant possession of the house was handed over to the plaintiffs on 15 December 1994 but without a certificate or occupation (CF). The authority only issued CF to the house on 5 January 1996. Upon receiving this, the plaintiffs proceeded, on the advice of the defendant, to request the electricity supplier (TNB) to connect electricity to the said house. This required the plaintiffs to sign an agreement with TNB, and only then on 16 January 1996 electriclty was duly supplied to the house.

Due to this delay in connecting electricity to the house the plaintiffs claim that cl. 20(2) of the S & P Agreement has not been complied by the defendant. The defendant was late in delivering vacant possession of the house with electricity connected thereto by 309 days beginning 1 March 1995 (24 months from date of S & P Agreement) till 16 January 1996 (the date when electricity was connected to the House).

Defendant's Case

The defendant denied having breached any of the terms in the S & P Agreement. From facts as it stand, the defendant argued as follows: The house was practically completed since 15 December 1994, well within the stipulated period of twenty-four months. Electricity supply was connected to the housing estate, where the house was erected, since November 1994. As CF was not granted to the house then, electricity could not be connected to the House as was the rule and practice by the authorities and the power supply company. Thus it was not the fault of the defendant for not connecting electricity supply to the house within the stipulated time. In such circumstances, cl. 20 in respect of "in the connection of water and electricity supply to the Building" should be interpreted as: connecting to the main power supply terminal in the area where the house would tap its supply from when connected after CF was issued to the house.

Issue

Undoubtedly, the issue in this case centers on the interpretation of cl. 20 in the S & P Agreement of whether vacant possession with electricity supply to the house means electricity connected to the house or sufficient when power supply only reached the electrical sub-station in the housing estate where the house is.

Analysis

To the defendant, this dispute is wrapped in a "chicken & eggs situation". Without the CF issued no electricity could be connected to the house even when power was available in the electrical cables in the area. But his approach was not appreciated by Abdul Malik Ishak J. in *Hoya Holdings Sdn Bhd v. Chia Thin Hing Anor* [1994] 4 CLJ 992, where he decisively, in a factual situation similar to the present case, declared that "with the connection of water and electricity supply to the said building" in their plain and ordinary meaning is: there must be water and electricity supplies actually running through the internal pipes, electrical and power lines in the dwelling house before the question of whether or not vacant possession has been delivered could even be considered.

Mr Jagjit Singh, counsel for the defendant, attempts to convince me that the above decision can be faulted on the ground that the learned judge did not consider the decision in *A-G v. County of London Electric Supply Co Ltd* [1926] Ch. 542 where the term "supply" was decided to mean use or supply for consumption not at the consumer's terminals but at the sub-supplier terminals. By this, he implies that the defendant cannot be found liable for breach of the S & P Agreement since the defendant had since 1994 obtained power supply to the sub-station of the housing estate.

I am not impressed with this argument. The above English case is entirely distinguishable on facts from our present environment. There it involved a contest between two power supply companies over territorial jurisdiction for the supply of power which required the interpretation of an English enactment - the English Electric Lighting Act 1909 - which is never applicable in this country. In our case we are not concerned with the interpretation of any legislation. Here the dispute is over the wordings of a clause in an agreement entered into by the parties, which interpretation in accordance with established legal principles must be confined to the four corners of the agreement itself and not from elsewhere.

After perusing the appeal record and the submissions of the parties, I am of the opinion that there is no ambiguity in the wordings of cl. 20 of the S & P Agreement. It means what it says: water and electricity must be connected to the house before it is considered to be completed with vacant possession for the purpose of calculating time to hand over the property to the plaintiffs. Simply put: it means when the plaintiffs entered the house upon delivery of vacant possession and turned on the lights it will be illuminated when he affixes a bulb to it. I cannot comprehend it to mean electricity supply only to a sub-station in the housing estate where the house is erected, be that terminal near or far.

The contention of the defendant having no control over the time frame in obtaining CF to facilitate electricity supply to the house is no excuse when it is an obligation agreed upon by the defendant. It is not a chicken & eggs situation as the defendant's counsel wish this court to believe. The defendant could have fulfilled its obligation within the period stipulated by either completing the house earlier to accommodate adequate time for inspection by the authorities responsible for the issue of CF, and/or building the house in accordance to plan and complying with all the requirements set by the authorities to avoid detection of faults so as to minimise time taken for rectification after the inspection. These are only some steps this court can think of that would enable the defendant to complete the house with water and electricity connected thereto within the meaning as expressed. The professional developer may have even more solutions to overcome this hitch, but whatever they are this time frame of 24 months to deliver a dwelling house with water and electricity connected to the house would certainly drive housing developers to be more efficient and professional. The Tom, Dick & Harry who possess little knowledge and experience in this trade and hope to learn the ropes at the expense of the purchaser would find themselves out of pocket if they are late in complying such clause as cl. 20 in this S & P Agreement.

By my reasons above, I find that the learned magistrate has erred in the application of legal principles to the facts. For this I allow this appeal with cost.